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Summary record of the 717th meeting
Held at the Vienna International Centre, Vienna, on Thursday, 28 June 2001, at 9.30 a.m.

Chairman: Mr. Pérez-Nieto Castro.....(Mexico)

Contents

Draft Convention on Assignment of Receivables in International Trade (*continued*)

Election of officers (*continued*)

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The meeting was called to order at 9.50 a.m.

Draft Convention on Assignment of Receivables in International Trade (*continued*) (A/CN.9/486, A/CN.9/489 and Add.1, A/CN.9/490 and Add.1-4 and A/CN.9/491 and Add.1)

Article 4 (*continued*)

Paragraph 1 (b) (*continued*)

1. **Mr. Smith** (United States of America) said that, while his delegation had no objection to the proposal put forward at the previous meeting concerning negotiable instruments, there were three areas that that proposal did not cover. The first area concerned situations in which a negotiable instrument was delivered in pledge to a lender. Such a situation might arise not through negotiation but through the mere physical delivery of the instrument under the law of pledge. Under the draft Convention, the priority of the pledge would be governed by the law of the assignor's jurisdiction, whereas the lender might naturally assume that, owing to its physical possession of the instrument, it had priority.

2. The second area of concern dealt with instruments that might not be technically negotiable instruments but which were treated under applicable law much like negotiable instruments. Such instruments normally represented a right to payment, and that right to payment was normally transferred through the physical delivery of the instrument, often with an endorsement or assignment. Once again, the transferee might have every reason to believe that, by taking physical possession of an instrument with an endorsement or assignment, it had priority and would normally not be aware that priority would be governed by the law of the assignor's jurisdiction.

3. The third area concerned electronic instruments. Many countries were developing laws where instruments could be evidenced in electronic form and where the electronic instrument was treated under the law as if it was a negotiable instrument. However, since the electronic instrument was not evidenced by a writing, it did not technically qualify as a negotiable instrument.

4. Although some delegations might object that his delegation was introducing new issues that should not be raised, the three areas of concern were merely amplifications of the policy underlying the discussion of negotiable instruments that had taken place at the previous meeting. A discussion of those issues in the context of article 4 would facilitate the Commission's consideration of article 41.

5. **Mr. Morán Bovio** (Spain) said that the representative of the United States should explain why the Secretariat's proposal on article 4, paragraph 1 (b), contained in paragraph 28 of document A/CN.9/491, did not resolve the three areas of concern that he had raised, as well as how the United States proposal resolved those issues.

6. **Mr. Smith** (United States of America) said that the Secretariat's proposal did not address all of the issues that he had raised. First, under the law of pledge, if an instrument was merely pledged but not negotiated, the lender might believe that it had priority, not realizing that its rights would still be affected by the Convention since no negotiation had taken place. Secondly, if an instrument was not a negotiable instrument, the rights of the holder of the instrument would be affected by the Convention. The Secretariat's proposal dealt only with negotiable instruments. There were several types of instruments that were not negotiable and which were normally pledged or transferred with endorsement or assignment. Electronic instruments were often not covered because in many countries the negotiable instrument law required that a negotiable instrument should be evidenced by a writing. In the negotiable instrument law of such countries, "writing" meant a physical writing, whereas that term was construed much more broadly in the draft Convention and could include electronic records.

7. **Mr. Deschamps** (Canada) said that, while a significant number of delegations had been in favour of the Secretariat's proposal, some delegations had expressed concern about the meaning of the term "negotiable instrument law". The United States delegation had attempted to solve that problem by proposing another text that was also intended to solve other issues. His delegation believed that the United States proposal would give rise to problems of

interpretation, in so far as the term "negotiable instrument" was viewed by some delegations as being not entirely clear. The use of the term "instrument" instead of "negotiable instrument" would require a definition of "instrument", and he wondered whether the Commission would be able to reach consensus in that regard. In a situation where someone wished to take as a pledge an instrument that was not a negotiable instrument and which nevertheless was capable of being pledged, his delegation would prefer the pledgee to have to comply with the Convention, as the lesser of two evils. It was extremely difficult to distinguish between a mere piece of paper and an instrument. For that reason, Canada supported the Secretariat's proposal.

8. **Mr. Stoufflet** (France) said that, at the previous meeting, the United States delegation had proposed that a list should be made of situations involving negotiable instruments. That approach was not entirely acceptable because lists were never complete and it was not always easy to interpret descriptions of specific practices. Perhaps the Secretariat's proposal could include wording to the effect that the same solution would apply to all transfers of instruments made in the same manner—namely by endorsement or delivery—as the negotiation. If an instrument was not negotiable by nature but was transferred in the same manner, the principle set forth in the Secretariat's proposal should apply. He wondered whether that formulation would be acceptable to the United States delegation.

9. **Mr. Morán Bovio** (Spain) said that the Secretariat's proposal was to be supplemented by an explanation in the commentary to the effect that "negotiable instrument legislation" would refer to cheques, promissory notes and bills of exchange as the main criteria. Thus, the draft Convention would exclude three instruments that had their own clear, applicable law. The United States proposal did not deal with cheques, promissory notes or bills of exchange but rather with any type of receivable that was covered by a writing. His delegation wished to know what type of assignment would remain under the Convention if the United States proposal was accepted.

10. **Mr. Doyle** (Observer for Ireland) said that, if a decision was to be taken, his delegation would favour adopting the Secretariat's proposal, since there seemed to be no better solution.

11. **Mr. Smith** (United States of America) said that his delegation could go along with the proposal made by the representative of France. That proposal would modestly expand the Secretariat's proposed language to include the delivery of instruments which, under applicable law, were transferred in much the same way as negotiable instruments.

12. **Mr. Whiteley** (United Kingdom) said that his delegation supported the solution proposed by the representative of France.

13. **Mr. Chan** (Singapore) expressed concern that the discussion was creating more difficulties than it was resolving. The longer a text was examined, the more problems would be identified, some of which were more real than others. While appreciating the concerns of the United States delegation, he did not understand why it had raised them at such a late stage. Even its written comments had failed to mention the fundamental point now raised. The United States representative argued that the inclusion of his concerns in the earlier subparagraphs of article 4 would help to determine the scope of article 4, paragraph 4, and article 41, which dealt with the exclusion of practices from the Convention. However, since there was no end to the number of current or as yet unknown practices that could be excluded, a more useful approach would be to determine the limits of exclusions, and to allow States to make the relevant declarations to exclude established practices that did not accord with the scope of the Convention. If the United States proposal to include additional exclusions in article 4, paragraph 4, was adopted, should any additional practices be identified at any subsequent time before the Convention entered into force, some States might refuse to become signatories, on the grounds that those practices were not excluded. It would thus be unwise to attempt to come up with a comprehensive list of excluded practices. Article 4, paragraph 4, and article 41 should be formulated first, with a view to determining what kind of exclusions could be made, and no further language should be added to the other subparagraphs in article 4. However, if that approach was not acceptable to the Commission, in its capacity as the Committee of the Whole, the proposal made by the representative of France would be an acceptable alternative.

14. **Mr. Deschamps** (Canada) said that, while he appreciated the United States concern and was

sympathetic to the proposal by France, the Commission was venturing into uncharted territory. If the exclusions were extended to apply not only to negotiable instruments, but also to any instrument transferable by delivery in the ordinary course of business, the applicable law would have to be determined, and the term "instrument" defined. For instance, an instrument called a chattel paper existed in the United States and Canada, which could be pledged and was unknown as a concept in most other legal systems. Would such a document be covered by the term "instrument"? If the Commission agreed that the solution proposed in the Convention—namely, that the law of the assignor's location should determine issues of priority—was appropriate, then the same solution could apply to so-called "instruments" which were not in fact negotiable instruments.

15. **Mr. Morán Bovio** (Spain) said that the representative of Canada had pinpointed the problem posed by the otherwise attractive proposal by France.

16. **Mr. Doyle** (Observer for Ireland) agreed with the representative of Singapore that the longer the discussion went on, the more difficulties would be encountered. Instead, the Commission should be looking to resolve problems by consensus. He would be happy to support the proposal by France if that would lead to a generally acceptable agreement.

17. **Mr. Whiteley** (United Kingdom) said that, as he understood it, France's proposal was not as wide in scope as the representative of Canada had suggested. The wording suggested by the Secretariat would be the basis for the proposal. Consequently, it would allow the Convention to apply, without displacing rules that would otherwise apply to determine priority. An instrument known as a bill of sale existed in the United Kingdom, for which a registration regime was in place. If France's proposal was adopted, that regime would continue to apply, while bills of sale assigned under the Convention would be covered by the Convention.

18. **Mr. Stoufflet** (France) said that his proposal had been an improvised solution, made with a view to building a consensus which responded to the concerns of the United States delegation. As the representative of the United Kingdom had indicated, it was not very ambitious in scope. It was simply a way of taking into account the fact that in some countries there were some types of receivables which were not negotiable instruments, but which served as such for some purposes. All he proposed was that, under the Convention, those types of receivables should be dealt with as if they were negotiable instruments.

19. **Mr. Deschamps** (Canada) said that, while his delegation would not oppose any text that enjoyed a broad consensus, it needed to see a written version of the text proposed by the French delegation. A number of difficulties of interpretation would be created by replacing the words "negotiable instrument" with "instrument". He failed to understand how that could be reconciled with the text proposed by the Secretariat in paragraph 28 of document A/CN.9/491, namely, "This Convention does not affect the rights and obligations of any person under negotiable instrument law". Although the wording could be amended to read "the rights and obligations of the holder of a negotiable instrument or any similar instrument", the problem remained how to amend the words "under negotiable instrument law". Under what law could those similar instruments be considered? Careful thought needed to be given to the legal implications of the French proposal before any decision was taken.

20. **The Chairman** suggested that the delegations of France, Canada, Spain, the United States of America, the United Kingdom and any other interested delegations should meet with the Secretariat in the interval before the afternoon meeting, with a view to developing an acceptable text capturing the notion of instruments transferred in a similar way to negotiable instruments. The resulting text would be referred to the Commission the following day.

21. *It was so agreed.*

22. **Ms. Sabo** (Canada) said that her delegation reserved the right to comment further on the drafting once a new formulation had been agreed, since it raised a policy issue.

Paragraph 2

23. **Mr. Smith** (United States of America) said that at a previous meeting the Secretariat had pointed out that the Hague Conference text on the law applicable to dispositions of securities held with an intermediary favoured a choice-of-law rule based on the place of the relevant intermediary approach (PRIMA), whereas the draft Convention gave priority to the location of the assignor. That situation might result in an overlap between the proposed Hague instrument and the draft

Convention. He asked whether that issue had been addressed.

24. **Mr. Bazinas** (Secretariat) said that the previous day a proposal had been received from the Hague Conference on how to avoid an overlap between its proposed text and the draft Convention. There appeared to be an emerging consensus in the securities industry in favour of PRIMA. The suggestion of the Hague Conference experts was that article 4, paragraph 2 (d), of the draft Convention should refer to "all securities held with an intermediary" rather than to "securities settlement systems", on the grounds that the reference to settlement systems would not be sufficient to exclude all indirectly held securities covered by the Hague Conference text.

25. **Mr. Markus** (Observer for Switzerland) supported the Hague Conference experts' proposal. Another solution would be to address the problem in paragraph 2 (f), but either approach would be acceptable. With regard to paragraph 2 (d), he asked whether the proposed formula would retain the adjective "investment", which, in his view, was redundant.

26. **Mr. Whiteley** (United Kingdom) said he fully agreed that there should be no overlap between the Convention and the Hague Conference text. As he saw it, paragraph 2 (d) referred to settlements of transactions that had taken place: inter-bank payment systems were used to transfer money once a transaction had been agreed and investment securities settlement systems were used to transfer securities. The securities excluded from the Convention under paragraph 2 (d) were therefore "in-flight" securities that were being transferred from a seller to a purchaser. Paragraph 2 (f) seemed to be the securities equivalent of paragraph 2 (c) inasmuch as it referred to the holding of securities. The reference in the chapeau to receivables "arising under or from" the holding of securities might be another way of saying "arising directly or indirectly from" securities held by an intermediary. The drafting group might wish to consider moving the relevant subparagraphs closer together to establish a clearer link between them.

27. **Mr. Smith** (United States of America), endorsing the points made by the representative of the United Kingdom, said that the drafting group should review the wording not only of paragraph 2 (f) but also of paragraph 2 (d). The term "investment securities" might not fully cover the types of financial assets that were subject to a settlement system and to which paragraph 2 (d) would be applicable. Clearance systems might exist for other kinds of financial assets that would normally also be held by intermediaries. With regard to paragraph 2 (f), the Commission seemed to intend that it should apply not only to the sale, loan or holding of, or agreement to repurchase, investment securities but also to a transfer of security rights in the securities or other financial assets credited to a securities account.

28. **Mr. Bazinas** (Secretariat) said that the drafting group would appreciate some guidance as to the type of amendment that the representative of the United States wished to make to paragraph 2 (d). He took it that paragraph 2 (f) should refer to all indirectly held securities and to security rights in such securities.

29. **Mr. Smith** (United States of America) proposed inserting a reference in paragraph 2 (d) to settlement systems relating to investment securities or other financial instruments or assets. The idea was that the exclusionary provision in paragraph 2 (d) should be applicable in cases where a financial instrument or asset was normally held in a securities account and a clearance or settlement system existed for that type of asset.

30. The categories of transaction to which paragraph 2 (f) was applicable should include a transfer of security rights in investment securities and a transfer of security rights in any type of financial instrument or asset that was to be credited to or held in a securities account.

31. **Mr. Markus** (Observer for Switzerland) suggested that the concern of the United States representative to cover all kinds of transactions in paragraph 2 (f) might be addressed by replacing the existing enumeration by the words "all transactions relating to investment securities".

32. **Mr. Ducaroir** (Observer for the European Banking Federation) said he preferred the term "investment securities" to "securities", as being more restrictive.

33. He pointed out that certain negotiable instruments were not payment instruments but financial assets: for example, assets called "commercial paper" in the United States of America were viewed as securities. Yet equivalent instruments in countries such as France,

e.g. *certificats de dépôt* or *billets de trésorerie*, were not regarded as financial assets. He thus wondered whether they were covered by the exclusionary provisions. If not, a decision should be taken regarding the gap in coverage affecting countries that did not classify commercial paper as securities. The matter should at least be clarified in the commentary to the article.

34. **Mr. Deschamps** (Canada) proposed using the wording of the Hague Conference text, article 3 of which provided that "dealings in securities credited to a securities account are governed by the law of the place of the relevant securities intermediary". The expression "dealings in securities" was used throughout the text. He proposed that article 4, paragraph 2 (f), of the draft Convention should be amended to read "Dealings in securities held with an intermediary".

35. The proposal by the representative of the United States to expand the exclusionary provisions to apply to financial assets that were not securities and to security rights in securities needed further exploration. It would be difficult to incorporate the latter addition under the chapeau of paragraph 2 and in his proposed new version of paragraph 2 (f). Perhaps security rights in securities were already implicitly covered by the term "dealings". He also drew attention to a possible narrowing of the exclusionary provision in paragraph 2 (f). As it stood, it would probably cover both directly and indirectly held securities. But the new version would be applicable only to securities held with an intermediary. He wondered whether the Commission wished to restrict the exclusionary provision to indirectly held securities.

36. **Ms. Summe** (Observer for the International Swaps and Derivatives Association Inc.—ISDA) said that ISDA was a global trade organization with over 530 members operating in 42 countries, who engaged in privately negotiated swaps and derivatives transactions. Her organization supported the place of the relevant intermediary approach (PRIMA) adopted in the Hague Conference text and was in favour of using the wording of that text, as suggested by the representative of Canada.

37. The inclusion of foreign exchange contracts, representing over a trillion United States dollars a day in value, in article 4, paragraph 2, would create great uncertainty and distort market practices in the 42 jurisdictions in which ISDA members operated. Moreover, the existing body of law on the subject might be difficult to harmonize with the Convention. She therefore suggested that foreign exchange contracts be excluded from the Convention.

The meeting was suspended at 11.20 a.m. and resumed at 11.55 a.m.

38. **Mr. Bazinas** (Secretariat) requested confirmation for the drafting group that the Commission wished to amend paragraph 2 (f) to include a reference to transfers of security rights and to expand the reference to securities by inserting a phrase such as "or other financial assets or instruments held with an intermediary".

39. With regard to paragraph 2 (d), he requested further guidance for the drafting group as to how it should be amended.

40. **Mr. Smith** (United States of America) reiterated that paragraph 2 (d) currently covered settlement systems that related only to what were called investment securities, a term not defined in the Convention. His understanding was that the receivables arising from clearance or settlement systems for financial assets that were normally transferred among financial intermediaries should also be excluded from the Convention. He was therefore concerned at the limitation of the exclusionary provision to settlement systems involving investment securities. It should also cover settlement systems involving financial assets and financial instruments that were generally held in a securities account. As some countries might not be familiar with the term "settlement systems", he proposed amending the text to read "clearance and settlement systems" to make it clear that the system was entitled to settle not only payments but also deliveries or other transfers of title to parties in the system.

41. **Mr. Bazinas** (Secretariat) said, with regard to the proposal by the observer for ISDA, that when the Convention had been drafted foreign exchange transactions had been assumed to be excluded under either paragraph 2 (a) or 2 (b). In response to concern within the financing industry over transactions that occurred outside a regulated exchange and were not covered by a netting agreement, the Commission might however wish to add a specific reference to foreign

exchange transactions in an additional subparagraph of paragraph 2.

42. **Mr. Franken** (Germany) expressed support for the proposal by ISDA, as outlined by the Secretariat.

43. **Mr. Ducaroir** (Observer for the European Banking Federation), after also supporting the ISDA proposal, suggested reversing the order of subparagraphs (e) and (f): whereas all the other subparagraphs were homogeneous and even overlapping, and therefore belonged together, subparagraph (e) related to a completely separate issue.

44. **Mr. Smith** (United States of America) supported the ISDA proposal, and also the drafting proposal made by the observer for the European Banking Federation.

45. *Paragraph 2 was approved.*

Paragraph 3

46. **Mr. Winship** (United States of America) said that at the thirty-third session of the Commission a decision had been taken, after considerable debate, to include within the scope of the draft Convention receivables in the form of rental payments arising from real property, in recognition of the difficulty experienced in some jurisdictions such as his own, where a variety of laws obtained with regard to what was considered a receivable. Rental payments were considered personal property in some states of the United States but real property in others. Practitioners in real property finance in the United States had since pointed out that the hurriedly drafted provision contained in paragraph 3 (a) could cause problems with regard to not only rental payments but also hotel room rentals or even seats in a football stadium. Would they be regarded as real or personal property under the draft Convention? In order to avoid the need for the United States and other countries with a similar problem to issue a declaration under article 4, paragraph 4, or article 41, existing paragraph 3 (a) could be replaced by a provision along the following lines: ["This Convention does not] (a) Apply to the assignment of a receivable related to land situated in a State in which a property right in land confers a right to such a receivable." Alternatively, a new subparagraph could be added, stating that a State could declare otherwise; and such a declaration could be accompanied by greater detail.

47. **Ms. Gavrilescu** (Romania) said that, in the interests of making the Convention as flexible and durable as possible, her delegation could accept the replacement of existing paragraph 3 (a) by the text proposed by the United States. In that case, the word "or", which appeared between subparagraphs (a) and (b) in document A/CN.9/486, annex I, but not in A/CN.9/489, paragraph 41, should be deleted. Subparagraph (b) should be retained.

48. **Mr. Stoufflet** (France) said he had no objection to the United States proposal. However, he requested confirmation, for the purposes of translation into French, that the word "land" included the constructions on such land.

49. **Mr. Winship** (United States of America) confirmed that "land" included the constructions on the land. He added that other jurisdictions with similar problems had objected to the terms "real estate" and "immovable". The term "real property" might be preferable.

50. **Mr. Whiteley** (United Kingdom) said that, if the United States proposal involved the total exclusion of receivables arising from land, it constituted a substantive difference from the current provisions of the draft Convention, which stated that the priority rules of the Convention would not apply where they would conflict with the priority rules relating to the land in question. Under English law, "land" included the constructions on that land, if they were permanent. Whichever term was ultimately chosen, the terminology in subparagraph (b) should be aligned with that in subparagraph (a), in order to avoid giving the impression that two different issues were involved.

51. **Mr. Doyle** (Observer for Ireland) said that, unlike the United Kingdom representative, he had always understood the provision to concern an exclusionary rather than a priority rule. The debate on the topic had been rather whether it should concern total or partial exclusion or the total inclusion of real property. Given that his delegation had always supported the widest possible exclusion, he was in favour of the United States proposal. He also found the term "land" acceptable: in Ireland, "land" included everything on that land.

52. **Mr. Morán Bovio** (Spain) expressed a preference for the existing text. He endorsed the view of the United Kingdom representative that the United States

proposal involved a broad exclusion. Its adoption would mean that, for example, building companies would not be able to assign rights in receivables against people who had rented offices. The draft Convention as it stood covered that situation. At first sight, without benefit of a text in Spanish, the United States proposal seemed unduly broad.

53. **Mr. Deschamps** (Canada) said that the problem of whether receivables which were rental payments should be excluded was a problem that arose in most countries, because under civil-law systems the principle was that property conferred the right to the proceeds of that property, including rent. His delegation believed that rents for real estate should therefore be excluded.

54. **Mr. Zanker** (Observer for Australia) associated his delegation with the view expressed by the observer for Ireland. In Australia, too, "land" included the land itself and everything built on it. He suggested that, for jurisdictions for which the provision caused difficulty, the phrase "property rights in real estate" could be replaced by the phrase "interest in real property".

55. **Mr. Kobori** (Japan) requested a clarification of the meaning of paragraph 3 (b) in view of the commentary contained in paragraph 56 of document A/CN.9/489. He would prefer to strengthen the term "make lawful" by replacing it with "give legal effect to" or "make legally effective".

Election of officers (*continued*)

56. **Ms. Ochieng** (Kenya), speaking on behalf of the African Group, nominated Mr. Enouga (Cameroon) for one of the posts of Vice-Chairman.

57. **Mr. Joko Smart** (Sierra Leone) seconded the nomination.

58. *Mr. Enouga (Cameroon) was elected Vice-Chairman by acclamation.*

The meeting rose at 12.35 p.m.